ORIGINAL

CASE NO. 81-6570

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IN THE

SUPREME COURT OF THE UNITED STATES

April Term, 1982

Luis Carlos Arango

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

On Petition for a Writ of Certiorari
to the Supreme Court of Florida

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI TO THE SUPREME COURT OF FLORIDA

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PREFACE

The Petitioner, Luis Carlos Arango was the Appellant in the Supreme Court of the State of Florida and the Defendant in the trial court. The Respondent, the State of Florida, was the Appellee in the Supreme Court of the State of Florida and the prosecution in the trial court. In this brief, the parties will be referred to as they appeared in the Florida trial court below.

The symbol "A" followed by a number will refer to a portion of the Respondent's appendix.

OPINION BELOW

The opinion of the Supreme Court of Florida is reported at Arango v. State, 411 So.2d 172 (Fla. 1982).

JURISDICTION

The defendant seeks jurisdiction, of this court under 28 U.S.C. §1257(3).

CONSTITUTION AND STATUTORY PROVISIONS

The defendant in his Petition for Writ of Certiorari claims error based on the Sixth and Fourteenth Amendments of the Constitution of the United States and Provisions of the Florida law.

STATEMENT OF THE CASE

For the limited purposes of this jurisdictional brief, the State, will accept the defendant's statement of the case as representing a generally accurate description of the proceedings in the court below. In addition, State has attached and marked as Exhibit "A" the pertinent portions of the transcript of the proceedings from the Florida trial court. Page numbers of appendix are as they appear in the original transcript of the proceedings.

QUESTION PRESENTED

WHETHER THE TRIAL COURT ERRED IN EXCUSING A VENIREMAN, WHERE THE RECORD IS CLEAR THAT HIS VIEWS ON CAPITAL PUNISHMENT WOULD PREVENT OR SUBSTANTIALLY IMPAIR THE PERFORMANCE OF HIS DUTIES AS A JUROR IN MAKING A DECISION AS TO THE DEFENDANT'S GUILT?

ARGUMENT

THE TRIAL COURT DID NOT ERR IN EXCUSING A VENIREMEN, WHERE THE RECORD IS CLEAR THAT HE COULD NOT RENDER AN, IMPARTIAL DECISION AS TO THE DEFENDANT'S GUILT.

In the case of Witherspoon v. Illnois, 391 U.S. 510 88, S. Ct. 1770, 20 L.Ed. 2d. 776, (1968). This court recognized that the State might well have the power to exclude jurors on the following narrowly drawn ground:

> "We repeat, however, that nothing we say today bears upon the power of a State to execute a defendant sentenced to death by a jury from which the only veniremen who were in fact excluded for cause were those who made unmistakably clear (1) that they would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or (2) that their attitudes toward the death penalty would prevent them from making an impartial decision as to the defendant's guilt.
>
> Id. at 522-523, N. 21.

In the present case before the court it is unmistakably clear from the record that the Veniremen's attitude toward the death penalty would prevent him from making an impartial deicison as to the Defendant's guilt. The court having thus satisfied the second prong of the Witherspoon test, properly excluded juror Alvarez.

Juror Alvarez initially stated in response to a question as to whether he had any moral or religious beliefs that would prevent him from sitting in judgment of another person, "I am against the death penalty." (A.15). The prosecutor then explained the two stage nature of the

proceedings, the guilt stage and the penalty stage, and asked whether Juror Alvarez' feeling was so strong that it would prevent him from coming back with a verdict on the facts. (A. 15-16). Juror Alvarez replied, "I believe so." (A. 16). The prosecutor then asked whether, if the State proved its case beyond and to the exclusion of every reasonable doubt and the evidence was overwhemling, Juror Alvarez would be able to return a verdict of guilty. (A. 16-17). The response was, "I am really not sure because it conflicts with my moral beliefs." (A. 17). The next questions related to whether Juror Alvarez could foresee a circumstance in which he could recommend the death penalty and whether there was a possibility that he could do so at the end of the case. (A. 17). The juror stated it was possible. (A. 17).

Juror Alvarez was questioned again later in the proceedings. He was asked if, in the first phase of the trial, he could vote just on evidence and the crime charge (A. 99-100) and replied, "in the first phase, I can vote on the evidence that's been presented." (A. 100). The prosecutor then clarified his question to make it more specific, asking whether juror Alvarez would be able to vote guilty if the State proved its case and juror Alvarez said, "I don't believe so, sir." (A. 100). The following then transpired:

> MR. KAHN (the prosecutor): You will not vote no matter what, guilty of first degree murder?
>
> JUROR ALVAREZ: No, sir.
>
> MR. KAHN: Is that due to the fact of the possibility of a death sentence?
>
> JUROR ALVAREZ: Yes, sir.

Juror Alvarez went on, however, to say "It's not only if I am asked to decide if he should receive capital punishment that bothers me. It's not the determination of guilt or innocence. But, the latter part." (A. 101). Defense counsel subsequently asked the somewhat confusing question, "You strike me-is that you have no problem understanding what the law is as the judge instructs you on the law. Do you think that being in that situation and knowing, as I have indicated before, that there is not going to be any plea to a jury or find the man not guilty because of the death penalty? There's not going to be any of that that you could, in the first phase, fairly and objectively decide whether or not the government has proved my client guilty beyond a reasonable doubt of first degree murder or any other crime." (A.101-102). The response was, "yes, I would be able to." (A. 102). Juror Alvarez then answered questions in a manner demonstrating that although he would be "hard-put" to recommend the death penalty, uder certain facts, it was possible that he could be persuaded that the death penalty was appropriate. (A. 102-103).

The trial court than asked whether juror Alvarez could make an impartial and fair determination of Defendant's guilt, knowing that he would then have to decide whether the death penalty would be applicable. (A. 103-104). The juror replied, "Sir, Your Honor, I don't believe that I can eliminate my moral beliefs against the death penalty." (A. 104). The prosecutor then asked whether juror Alvarez' moral conviction was so strong as to influence his verdict regarding guilt or innocence and the response was that it depended on facts and circumstances of the case. (A. 104-105). Finally, the following occurred;

MR. KAHN: Okay
If His Honor were to instruct you that not at all should it ever influence a question of guilt or innocence, would you be able to follow that instruction competely, and not be affected by your moral belief in determining the guilt or innocence phase?

JUROR ALVAREZ: No, sir, I don't believe so.

Juror Alvarez stated that he could not vote guilty of first degree murder due to the possibility of the death sentence, (A. 100), that he could not eliminate his moral beliefs against the death penalty in making a determination of Defendant's guilt (A. 103-104) and that he did not believe he would be able to follow an instruction from the trial court to not allow his moral belief in influence the question of guilt. (A. 105). These statements clearly establish a basis for the exclusion of juror Alvarez, as it is apparent that his beliefs would have prevented him from reaching an impartial decision as to guilt.

The fact that juror Alvarez gave other answers which might be viewed in isolation as tending to indicate an ability to consider the question of guilt does not change the appropriate conclusion. It is apparent from considering all of juror Alvarez' statements that he could not have been impartial. It seems that his statements as to an ability to consider the evidence were probably intended to convey the fact he could consider a defendant's guilt when there was no possibility of a death sentence, but that he could not be impartial when there was such a possibility.

This court in Adams v. Texas, _____U.S._____, 100 S. Ct. 2521 ____L.Ed. 2d. _____ (1980) stated that the Witherspoon line of cases establishes the general proposition that a juror may not be challenged for cause based on his views about capital punishment unless those views would prevent or substantially impair the performance of his duty as a juror in accordance with his instruction in his oath. In applying that proposition to this particular set of facts it is clear from the entire record pertaining to juror Alvarez, that his views on capital punishment would prevent, or at the very least substantially impair the performance of his duties as a juror.

In the case of Lockett v. Ohio, 438 U.S. 586, 98 S. Ct. 2954, 57 L.Ed. 2d. 973 (1978). This court stated hat the excusal of four veniremen who could not take the following oath to be proper under Witherspoon:

> "do you feel that you could take an oath to well and truely [sic] try this case. . and follow the law, or is your conviction so strong that you cannot take an oath, knowing that a possibility exists in regard to capital punishment?"

The court further stated that by not taking this oath each of the excluded veniremen made it "unmistakably clear that they could not be trusted to abide by existing law and to follow conscientiouly the instructions of the trial judge." As in this case, it is just as unmistakably clear that juror Alvarez could not be trusted to abide by existing law and to follow conscientiously the instructions of the trial judge.

Even if it is said that the trial court did ruled incorrectly on the challenge for cause, reversal

should not result, as any error in this regard was harmless. In this case the state used only four peremptory challenges, (said challenges found at pages 189, 252, 274, and 282 of the transcript of the proceedings), although it had ten available. Florida Rule of Criminal Procedure, 3.350. Thus, if not excused for cause, juror Alvarez could have been, and certainly would have been, excused by the State. This issue has been raised, in this court, by Justice Rehnquist in his dissenting opinion in the case of Davis v. Georgia, 429 U.S. 122, 97, S. Ct. 399, 50 L.Ed. 2d 399 (1976).

> "...and surely Witherspoon does not decide whether the presence of unexercised peremptory challenges might render harmless the improper exclusion of a limited number of veniremen.

Finally, the State would submit, that the true issue, presented by the defendant, is soley an issue of fact. The defendant is asking this court to determine whether Juror Alvarez' statements were sufficient for his excusal as a juror, under the Witherspoon doctrine. In both Witherspoon and Adams the court was presented with a much broader issue, specifically, the validity of State Statutes that allowed the excusal of jurors for their beliefs about capital punishment. This case, as presented by the defendant, has neither shown any implication for the growth of law or the efficient administration of justice nor implication for any particular segment of society. Therefore, since the defendant has failed to present a susbstantial legal issue, the state submits this court should deny his Petition for Writ of Certiorari.

CONCLUSION

THE PETITIONER, has fail to present any matters sufficient to warrant the exercise of this court jurisdiction pursuant to 28 U.S.C. 1257(3).

Respectfully submitted,

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AFFIDAVIT OF SERVICE

I, JOHN F. ROBENALT, Assistant Attorney General, State of Florida, after first being duly sworn according to law, depose and say:

I HEREBY CERTIFY that three copies of the Brief of Respondent in Opposition to the Petition for Certiorari were served upon the Petitioner's Attorney, Vincent J. Flynn, FLYNN, RUBIO & TARKOFF, 1414 Coral Way, Miami, Florida 33145, by mailing copies of same to him by United States Mail, First Class postage prepaid, pursuant to Rule 23 of this Court, this 26th day of May, 1982.

JOHN F. ROBENALT, Esquire
Assistant Attorney General

SWORN TO AND SUBSCRIBED before me at Miami, Dade County, Florida, this 26th day of May, 1982.

NOTARY PUBLIC

NOTARY PUBLIC STATE OF FLORIDA AT LARGE
MY COMMISSION EXPIRES JULY 31 1984
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